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No. 83-498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, Director of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY, Division of Gaming Enforcement, State of New Jersey and THOMAS KEAN, Governor, State of New Jersey,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, President Hotel and Restaurant Employees and Bartenders International Union Local 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATE OF NEVADA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Dated: January 12, 1984

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No. 83-498

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

G. MICHAEL BROWN, DIRECTOR OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATE OF NEVADA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The State of Nevada joins its sister state, New Jersey, in its position that federal law

should not and does not prohibit states from imposing appropriate, though limited, requirements on union officials who represent gaming industry employees. All matters affecting the ability to strictly regulate gaming are of vital concern to Nevada. The Nevada Legislature has stated that a well regulated gaming industry is tremendously important to the economy of Nevada and to the general welfare of its citizens.

> The legislature hereby finds, and declares to be the public policy of this state, that:
>
> . . . .
>
> . . . The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming is conducted honestly and competitively and that gaming is free from criminal and corruptive elements.
>
> . . . Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture or distribution of gambling devices and equipment.

Nev. Rev. Stat. § 463.0129 (1983).

Furthermore, the Legislature has found that, "[i]n the past, attempts have been made by persons whose background is not suitable for association with licensed gaming to gain positions of control in labor organizations representing gaming casino employees in this state." Nev. Rev. Stat. § 463A.010(2) (1979). Consequently, to serve these State interests, the Nevada Legislature has determined that it may be necessary to determine the personal suitability of those who perform certain key functions in representing gaming casino employees in this State. Id. ch. 463A.

A ruling affirming the Third Circuit majority opinion in the instant case could significantly weaken Nevada's ability to protect its vital interests.

I. THE THIRD CIRCUIT MISAPPLIED PREEMPTION ANALYSIS BY MISREADING CONGRESSIONAL INTENT CONCERNING STATE INVOLVEMENT IN LIMITED AREAS OF LABOR RELATIONS.

Nevada joins in New Jersey's argument that the Third Circuit misapplied the preemption doc-

trine by oversimplifying its application in this case. Nevada agrees with the views expressed in Judge Becker's dissenting opinion, and urges this Court to adopt them as controlling in this case. "[F]ederal labor law does not preempt [state] restrictions on the right of casino-industry employees to select certain individuals as union officials." Hotel & Restaurant Employees International Local 54 v. Danziger, 709 F.2d 815, 836 (Becker, J., dissenting) (hereinafter "Opinion below").

If a state attempts to regulate matters actually or arguably protected or prohibited by the National Labor Relations Act (NLRA), then the state regulation is usually preempted. Local 926, International Union of Operating Engineers v. Jones, ___ U.S. ___, 103 S. Ct. 1453 (1983).

> When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of

> the power to act, we refuse to invalidate state regulation or sanction of the conduct. . . . The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the [NLRB's] exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

Id. at ___, 103 S. Ct. at 1458-59.

The preemptive scope of federal labor laws is usually not strikingly clear. Congressional intent must be pieced together from its conflicting statements. See, e.g., Garner v. Teamsters, Chauffeurs and Helpers Local Union 776, 346 U.S. 485 (1953). It is not always apparent how much room has been left for the states.

The NLRA grants employees the right to choose their own bargaining representatives. 29 U.S.C. § 157 (1976). This "free choice," however, is not completely unfettered. The Labor Management Reporting and Disclosure Act (LMRDA) contains

specific disqualification criteria. 29 U.S.C. § 504 (1976). Congress has enunciated these disqualification standards to serve the public good by attempting to remove the criminal element from labor organizations. See generally Illario v. Frawley, 426 F. Supp. 1132 (D.N.J. 1977). In fact, all of the federal legislation in the field of labor relations is intended to serve the public good by freeing interstate commerce from burdensome labor disputes. See generally International Union, Local 283 v. Scofield, 382 U.S. 205 (1965); United States v. Brown, 381 U.S. 437 (1965).

But it does not necessarily follow that Congress has intended that the states may not enact other disqualification standards that serve their vital interests. A more reasonable reading of Congressional intent is that states may complement the federal scheme in this area. International Longshoremen's Association v. Waterfront Commission, 495 F. Supp. 1101

(S.D.N.Y. 1980), aff'd in part and rev'd on other grounds, 642 F.2d 666 (2d Cir. 1981), cert. denied, 454 U.S. 966 (1981). Congress has previously acquiesced in bi-state legislation designed to eradicate labor strife in the Port of New York. See DeVeau v. Braisted, 363 U.S. 144 (1960). In light of the unique industry in question here - casino gambling - and its somewhat spotted history, it seems likely that federal labor authorities would welcome a role for Nevada and New Jersey.

As discussed below, Nevada's goal is to strictly regulate its most important industry by having available a mechanism to disqualify key gaming labor officials convicted of various crimes or associated with organized crime. National labor policy is not threatened by these state restrictions. The fact that Nevada and New Jersey can disqualify certain labor officials does not present an "unacceptable risk" to national labor policy. See generally Farmer v.

Carpenters, 430 U.S. 290 (1977) (state court remedies for tortious activity allegedly caused by union conduct not preempted). Consequently, if a state interest is sufficiently compelling, the Supremacy Clause of the United States Constitution does not require invalidating state law respecting gaming employee labor organizations.

II. BECAUSE OF NEVADA'S DEEPLY ROOTED INTEREST IN PROTECTING THE INTEGRITY OF ITS GAMING INDUSTRY, FEDERAL LABOR LAW ON BALANCE DOES NOT PREEMPT LIMITED STATE REGULATION OF GAMING EMPLOYEE UNION OFFICERS.

Nevada has a long and unique history involving gambling. Even prior to Nevada's admission to the Union, gambling was an integral part of life in Nevada. The discovery of gold and silver on the "Comstock Lode" near Virginia City in 1858 created mining towns filled with persons seeking to strike it rich. Gambling became a major activity and a vital component of these early days in Nevada. J. Skolnick, House of Cards 103 (1978).

Following statehood in 1864, the Nevada Legislature legalized gaming in 1869 over the veto of the governor. Securities and Economic Research Division, Nevada Gaming Commission and State Gaming Control Board, Gaming Nevada Style 9 (1977) (hereinafter "Gaming Nevada Style"). The law approved numerous gambling games and imposed license fees, which the counties and the State initially shared equally.

Nevada restricted casino gaming between 1910 to 1931. Neither the outright prohibition that was in effect at the beginning of this period, nor more lenient restrictions later, were strictly enforced. Id. In 1931, the modern era of gaming control began. The Nevada Legislature again legalized all forms of gaming (except lotteries), and called for disposition of license fees to the State (25%) and to the counties (75%). Act of March 19, 1931, ch. 99, 1931 Nev. Stat. 165. County officials were responsible for licensing, and for monitoring compliance with gaming laws.

Among the factors contributing to the return to "wide-open" gaming were a desire to control the widespread illegal gambling occuring under previous laws, Gaming Nevada Style, supra, p. 9 at 10, and "the hope that . . . [legalized gaming] would enhance business[,] which had suffered severely in the nationwide depression." Id. (quoting R. Zubrow, R. Decker & E. Plank, Report to the 1960 Legislature (hereinafter the "Zubrow Report")). At that time, Nevada had fewer than 100,000 residents, most of whom were employed in mining, agriculture, and the railroads. Economic Research Associates, The Role Of Gaming In The Nevada Economy, An Update V-I (1983) (hereinafter "The Role Of Gaming"). Revenue from tourism was miniscule; gaming was an activity enjoyed primarily by local residents. Id.

The Nevada Legislature also hoped to raise State tax revenues.

> "[I]t was recognized that legalized gambling would provide an additional source of tax revenue and needed relief from

> other taxes. As stated by the Nevada State Journal on January 18, [1931] prior to passage of the bill, '[T]here is strong sentiment, particularly in Southern Nevada, that some state or municipal revenue should be derived from the games which now run on every hand with apparent sanction of public sentiment. * * *'"

Gaming Nevada Style, supra, p. 9 at 10 (quoting the Zubrow Report, supra, p. 10.

Following the 1931 Act, there was no immediate burst in gaming revenue. From 1931 to 1941 gaming revenue increased only 49%. Id. During the next three year period, however, gaming revenue increased another 56%. Id. Then, in 1945, 1946 and 1947, gaming increased 19% each year. Id. Nevada's economy was nurtured by and gained strength from the gaming industry.

During this same period, however, elements of organized crime began to view Nevada's gaming industry as a unique opportunity for exploitation. House of Cards, supra p. 8, at 111-18. Nevada's response to protect its interests was to provide more mature and vigorous control mechanisms.

In 1947, primary license responsibilty (including the power to revoke a license) was passed to the State authorities acting through the Tax Commission. In 1955, the State Gaming Control Board was created as a separate arm of the State Tax Commission. The Board's function was and is to investigate applicants for licensing and to prosecute violations of applicable regulations. Act of March 29, 1955, ch. 429, 1954-1955 Nev. Stat. 883. In 1959, a new State agency, the Nevada Gaming Commission, was created as the final arbiter on licensing and disciplinary matters, thus removing the Tax Commission from the gaming arena. Act of March 30, 1959, ch. 318, § 4, 1958-1959 Nev. Stat. 427.

Over the last thirty years, the gaming industry has become the preeminent force behind Nevada's development. All indicators of Nevada's well-being are tied to the growth and performance of the gaming industry. Nevada has

the highest tourism dependancy of any state in the nation, and 80% of state tourism is directly attributable to the availability of legalized gaming. The Role Of Gaming, supra p. 10, at II-1, VI-28, 29. Sixty percent of all jobs in Nevada are directly or indirectly supported by the gaming industry. Id. at II-1, V-23. License fees on gross gaming revenue and casino entertainment taxes comprised 23.9% of the State's general fund in 1951-53, and increased to 52.3% for 1981-82. Id. at IV-10. If sales tax revenue attributable to gaming tourists and other economic activity related to gaming are considered, gaming supports approximately 80% of the State budget. Id. at IV-2. Hence, it is not surprising that the Legislature has seen fit to provide mechanisms regulating all aspects of gaming.

Nevada's vital interest in gaming has been recognized by the federal courts as well as the Supreme Court of the State of Nevada. See Marshall v. Sawyer, 301 F.2d 639 (9th Cir.

1962) (Pope, J., concurring); Nevada Tax Commission v. Hicks, 73 Nev. 115, 310 P.2d 852 (1957); State v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982).

The Glusman case involved a constitutional challenge to a provision of Nevada law that gave the Nevada Gaming Commission the discretion to call forward a person doing business on the premises of a licensed gaming establishment for a determination of suitability to be associated with a gaming enterprise. The court upheld the statute as a reasonable exercise of the State's police power. Id. at 423, 651 P.2d at 646. In describing the "unique setting" of the Nevada gaming industry, the Nevada Supreme Court noted:

> The peculiar nature of the gaming industry presents numerous concerns and problems of control, the resolution of which must be readily available to cognizant government authorities of this state. It has been clearly recognized by our earlier decisions that gaming longevity and vitality, under continuing state authority, are dependent upon effective control mechanisms which will assure appropriate

> deference to the health, safety and welfare of the citizenry.

98 Nev. at 417-18, 651 P.2d at 643.

The Court of Appeals for the Ninth Circuit has stated: "[I]n a very real sense, . . . the State of Nevada itself is in the gambling business, and its continued maintenance of that institution is vital to the State's life and its economy." Marshall v. Sawyer, 301 F.2d at 648 (Pope, J., concurring). Nevada has no opportunity to invoke the jurisdiction of the National Labor Relations Board to disqualify notorious labor officials, but rather must rely on its police power, reasonably exercised, to protect its most vital interest.

Chapter 463A of the Nevada Revised Statutes requires registration and permits investigation into the individual suitability of key personnel in gaming labor organizations. It is one further mechanism in Nevada's regulatory evolution. It is a reality that in today's labor-management relationship, labor organi-

zations have an active role in the terms and conditions of employment, work schedules, lay-off procedure, fringe benefits, and other provisions of collective bargaining agreements. N. Levin, Successful Labor Relations 7-13 (1978). The Nevada Legislature enacted NRS chapter 463A to deal with the corruptive elements in labor unions that could endanger the legitimate operation of gaming in Nevada. The Legislature found that:

> 1. The relationship which exists between a labor organization and the employees whom it represents in collective bargaining is such that it may significantly affect the conduct of a gaming operation by an employer.
>
> 2. In the past, attempts have been made by persons whose background is not suitable for association with licensed gaming to gain positions of control in labor organizations representing gaming casino employees in this state.
>
> 3. In order to carry out the declared policy of this state and that licensed gaming be conducted freely and honestly, and in order to protect the welfare of the employees of the gaming industry which is fundamental to the economy of this state, it is necessary to determine the suitability of any person who performs certain significant functions in the representa-

tion of gaming casino employees in this state.

Nev. Rev. Stat. § 463A.010 (1979).

This statute was enacted following extensive hearings before a joint meeting of the Nevada Senate and Assembly Judiciary Committees. Incorporated into the record of the Joint Committee's deliberations were the following items: (a) S. Rep. No. 187, 86th Cong., 1st Sess., 2318 (1959); (b) D. Cressy, Theft of the Nation (1969); and (c) President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime (1967). Casino Employee Representative Licensing, Joint Hearing on S.B. 614 Before the Senate and Assembly Judiciary Committees, 58th Session (Nev. 1975). The committee heard extensive arguments from advocates on both sides of the issue. One representative of labor called the measure "responsible and responsive legislation. We're more worried than anybody about improper people in our industry. It's a good bill."

Reno Evening Gazette, May 13, 1975, at 13, col. 1 (statement of I.R. Ashleman II, attorney for Culinary Workers Local 226).

The requirements that Nevada imposed on labor organizations that represent gaming casino employees are very limited. Chapter 463A requires that such labor organizations file with the State Gaming Control Board a list of personnel who:

> (a) Adjust grievances for, negotiate or administer the wages, hours, working conditions or conditions of employment of any gaming casino employee;
>
> (b) Solicit, collect or receive any dues, assessments, levies, fines, contributions or other charges within this state for or on behalf of the organization from gaming casino employees; or
>
> (c) Act as officers, members of the governing body, business agents or in any other policymaking or supervisory position in the organization.

Nev. Rev. Stat. § 463A.030(1) (1979). As defined in Nevada's Gaming Control Act,

> "Labor organization" means an organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers of

gaming casino employees concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work of gaming casino employees.

Id. § 463A.020(4).

Gaming casino employee is defined as:

[A]ny person employed directly or indirectly in the operation of a gaming establishment under a nonrestricted license, including:

(a) All personnel involved in the operation of a casino gaming pit, such as dealers, shills, clerks, hosts, junket representatives and the supervisors of such persons;

(b) All personnel involved in handling money, such as cashiers, change persons, count teams, coin wrappers and the supervisors of such persons;

(c) All personnel involved in the operation of games, such as bingo and keno;

(d) All personnel involved in operating and maintaining slot machines, such as mechanics, floormen, change and payoff persons and the supervisors of such persons;

(e) All personnel involved in security, such as guards, games observers and the supervisors of such persons;

(f) All personnel involved in the operation of a race or sports book, such as writers, boardmen, cashiers and the supervisors of such persons;

(g) All personnel involved in the operation of a pari-mutuel operation licensed under chapter 464 of NRS and any sporting event on which such pari-mutuel wagering is conducted; and

(h) Such other persons whose duties are similar to the classifications set forth in paragraphs (a) to (g), inclusive, as the commission may from time to time designate by regulation, but does not include personnel whose duties are related solely to such nongaming activities as entertainment, hotel operation, maintenance and the preparation and serving of food and beverages.

Id. § 463A.020(3).

Thus, Nevada's statute is restricted to unions representing employees engaged in actual gaming activities, whereas New Jersey's is much broader in scope. N.J. Stat. Ann. § 5:12-93. See Opinion below, 709 F.2d at 818. The Third Circuit found "unpersuasive" the argument that state legislation, such as Nevada's, that is restricted to casino employees should not be preempted. Opinion below, 709 F.2d at 829. It is respectfully submitted that this dictum is premised on a mistaken reading of congressional intent. The majority below failed to rebalance

the respective interests in light of a more limited state involvement in labor affairs.

Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945), does not compel a different conclusion. In Hill, this Court invalidated a Florida statute that required licensing of all persons holding certain offices in all unions operating in the state. The instant case, on the other hand, involves more limited legislation directed at a single industry that historically has required the strictest regulation.

Nevada's law is even more limited and less intrusive. The registration requirement may be the total extent of the State's involvement with the gaming labor unions. A decision to investigate any of the listed personnel is discretionary with the State Gaming Control Board. The board may investigate any person listed if it has reason to believe that the public policy of the State so requires. Nev. Rev. Stat. § 463A.050 (1979). Any costs of such

an investigation are paid by the State. Id. § 463A.050(2).

If Nevada's State Gaming Control Board determines that a union official should be disqualified under the policy constraints of Nevada law, the Board must notify the official and the labor organization of the reasons for its recommendation, and allow the official a hearing to present a defense. Id. §§ 463A.060, .070.

Full procedural rights are accorded the official before the Nevada Gaming Commission. Id. §§ 463A.110-.170. The commission may disqualify any person from performing a listed function only if it finds that:

> He has been convicted in any jurisdiction of any crime involving moral turpitude or indicating a lack of business integrity or honesty, whether denominated a felony or misdemeaner.
>
> . . . He has made or caused to be made any statement in a document provided to the board or its agents or orally to a board member or agent in connection with an investigation or listing which was, at the time and in the light of the circum-

stances under which it was made, false or misleading.

. . . He is a member of or an associate of organized criminal elements. Identification as such a member or associate by any law enforcement agency, legislative body or crime commission constitutes evidence which may be considered by the Nevada gaming commission.

. . . His moral character and integrity, as evidenced by his prior conduct, are such as to create a reasonable belief that his performance of the specified function would not be consistent with the policy of this state that gaming be conducted freely and honestly or with the welfare of the employees of the gaming industry.

Id. § 463A.040.

Judicial review is available to any person aggrieved by a decision of the commission. Id. § 463A.180. Even after a notice of disqualification is entered, the commission will still have to seek an injunction from State district court to enjoin the official from performing the function from which he is disqualified. Id. § 463A.250. These judicial safeguards prevent any arbitrary or unwarranted infringement on national labor policy.

Thus, Nevada's statutes initially impose only a registration requirement, and permit further state action only in specific, limited situations, and only after due process has been afforded. Moreover, these minimal restrictions may be applied only to unions involved in a specific, uniquely situated industry.

The statutes are as narrowly drawn as they can be without sacrificing altogether the State's ability to exercise some control over persons involved in its most important and most strictly regulated industry. Accordingly, the State of Nevada respectfully urges that the states not be barred from exercising limited supervision of gaming union officers.

CONCLUSION

Congress has not deprived Nevada and New Jersey of the ability to regulate union officials in the gaming industry. The deeply rooted and vital interests of New Jersey and Nevada weigh in favor of permitting limited state disqualification standards respecting choice of

bargaining representatives and collection of dues. This limited state scrutiny of gaming employee labor organizations does not present an unacceptable risk to federal labor policy.

For the foregoing reasons, the State of Nevada respectfully requests that the Third Circuit's decision be reversed.

DATED: January 12, 1984.

Respectfully submitted,

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